

United States Court of Appeals
For the Ninth Circuit

ALASKA STEAMSHIP COMPANY, *et al.*, *Petitioners*,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, *Respondents*.

PETITION FOR REVIEW OF ORDER OF FEDERAL MARITIME
COMMISSION

BRIEF OF PETITIONERS

EDWARD G. DOBRIN

STANLEY B. LONG

ARTHUR G. GRUNKE

Attorneys for Petitioners

FILED

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG

Of Counsel

Office and Post Office Address:

14th Floor Norton Building

Seattle, Washington 98104

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United States Court of Appeals

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ALASKA STEAMSHIP COMPANY, *et al.*,
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vs.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

No. 20351

PETITION FOR REVIEW OF ORDER OF FEDERAL MARITIME
COMMISSION

BRIEF OF PETITIONERS

This is a review of the August 19, 1965 Order¹ of the respondent, Federal Maritime Commission, entered in a rate investigation pending before the Commission in its consolidated dockets Nos. 969 and 1067.

JURISDICTION

The existence of this Court's jurisdiction appears from the allegations of paragraphs II, III and IV of the Petition for Review.

STATEMENT OF THE CASE

The August 19, 1965 Order was entered by the Commission following this Court's decision and decree in a prior review proceedings setting aside the Commission's two prior orders in said consolidated dockets and

¹Exhibit A to the Petition for Review.

remanding the proceedings to the Commission (*Alaska Steamship Co. v. Federal Maritime Comm.*, 344 F.2d 810, April 15, 1965, File No. 19297).

Alaska Steam² is a common carrier by water, serving Alaska, principally to and from Puget Sound ports. This service is referred to as the overall Alaska operation and consists of a so-called scheduled service and a so-called seasonal service.³

On December 18, 1961 Alaska Steam filed with the Commission so-called Company rates increasing rates on cannery supplies and canned salmon moving in both the scheduled and seasonal services and on all other commodities moving in the seasonal service. The Commission suspended these rates and entered on an investigation in said consolidated dockets. The rates became effective on May 18, 1962 following the expiration of the suspension and have since continued in effect. This Commission's investigation resulted in the orders which were set aside in the prior review proceedings. In the first of these orders, March 5, 1964 Order, the Commission found that the Company rates produced a rate of return of 19.75% in the seasonal service based on the test period used by the Commission, November, 1961 through October, 1962, as adjusted, and that they were unjust and unreasonable to the extent that they

²Alaska Steam, as in the prior review proceedings, will be referred to as though it were the only petitioner.

³The same terms will be here used as were used by petitioners in the prior review proceedings.

produced a rate of return in excess of 10%. In the second of these orders, May 12, 1964 Order, the Commission denied a motion to reopen the investigation to receive evidence of the actual results of the seasonal service for the years 1962 and 1963. Alaska Steam asserted that the Company rates were in compliance with the March 5, 1964 Order as they were not actually producing a rate of return in excess of 10% and that further increased rates were justified due to losses being incurred in the seasonal service. The Commission in denying the motion to reopen stated that amended tariffs were to be filed which "must clearly set forth decreases, not increases" and ordered the filing of tariffs naming lesser percentage increases, which it found were the "maximum fair and reasonable increases" permissible, being the so-called Commission rates.

In the prior review proceedings this Court found that the Commission erred in its determination of the Federal income tax to be deducted as an expense in arriving at net profit and rate of return in the seasonal service and further that the Commission had failed to disclose "the basis" on which the Commission rates were computed and the "reasons for selecting that basis" making it necessary to remand the proceedings for "findings and conclusions" on the matter. This Court further held that Alaska Steam should be permitted to renew its motion to reopen the investigation "to receive later operating figures" and that such a renewed motion should not be denied by the Commission unless there

were “considerations not drawn to our attention which would warrant such a denial.” Alaska Steam filed such a renewed motion to reopen.⁴

In the August 19, 1965 Order the Commission denied the renewed motion to reopen, redetermined the Federal income tax to be deducted as an expense in arriving at net profit in the seasonal service at the Company rates based on the test period and found the rate of return to be 13.97%, not 19.75% as it had previously erroneously found. The Commission in the August 19, 1965 Order did not attempt either by findings or conclusions to justify the Commission rates or to order that they be put into effect, but required the filing of decreased rates which would have produced a rate of return of not to exceed 10% in the seasonal service based on the test period. The Commission does not attempt to prescribe how this end result is to be accomplished, namely, whether all of the Company rates, or only some, are to be decreased and, in either event, whether the decrease is to be on some uniform basis or formula or whether the decreases may vary as between commodities. Concededly these decreased rates ordered by the Commission are in no way to be based on existing or anticipated future operating data. This, despite the showing made to the Commission in the motion to reopen and in the renewed motion to reopen that the seasonal service operated at a loss in 1963 and 1964.

⁴Exhibit B to Petition for Review.

**SPECIFICATION OF ERRORS AND POINTS
RELIED UPON**

The Commission in entering its August 19, 1965 Order was arbitrary and capricious, abused its discretion and erred in the following respects:

1. In denying the renewed motion to reopen and thereby failing to comply with this Court's decision and decree in the prior review proceedings.

2. In failing to grant Alaska Steam a hearing on the renewed motion to reopen, thereby depriving it of due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States and the procedural requirements of the Administrative Procedure Act.

3. In ordering the filing of decreased rates, resulting in confiscation, deprivation and taking of property of Alaska Steam for public use without due process of law and without just compensation, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

4. In determining the amount of administrative and general expense to be allocated to the seasonal service under the formula approved by this Court, resulting in an erroneous determination of the rate of return in the seasonal service.

5. In giving effect to an item of \$13,015 interest as a deduction in the process of determining the Federal

income tax applicable to the seasonal service, resulting in an erroneous determination of the rate of return in the seasonal service.

6. In failing to treat the charter operation of the vessel TALKEETNA as a part of the seasonal service, resulting in an erroneous determination of the rate of return in the seasonal service.

ARGUMENT

I.

The Renewed Motion to Reopen (Specification of Errors 1 and 2)

Alaska Steam in its renewed motion to reopen filed with the Commission requested an opportunity to be heard if the Commission “deems that there are or may be considerations not drawn to the attention of the Court of Appeals * * * adversely affecting the granting of this petition.” In response to this motion the Commission’s Hearing Counsel stated that petitioners were proceeding “in conformity with the decision rendered by the Court of Appeals” and that the Court had directed “that the Commission reopen the proceedings to receive later operating figures of Alaska Steam unless there were other considerations not drawn to the Court’s attention which would warrant a refusal to consider these figures.” Hearing Counsel acquiesced in the reopening and stated:

“The Court was aware that receipt of these figures would necessitate remanding the matter to an examiner with attendant delay as well as the necessity of closing a regulatory proceeding in timely

fashion. Hearing Counsel are not aware of any other considerations which would justify such refusal.”

The August 19, 1965 Order was entered without notice to or giving Alaska Steam an opportunity to be heard.

The Commission’s reasons for denying the renewed motion to reopen are stated as follows:

“The Commission is of the opinion that an amplification of the reasons advanced to the Court of Appeals in support of the argument that denial of Alaska Steam’s previous petition to reopen was not an abuse of discretion coupled with considerations not drawn to the Court’s attention warrant the denial.” (p. 2)

The Commission is not in a position to argue that its denial of the “previous petition to reopen was not an abuse of discretion.” This argument has been foreclosed by this Court’s decision in the prior review proceedings. The Commission was unsuccessful in those proceedings in having this Court hold that its denial of the previous motion to reopen was not arbitrary and capricious and should not be set aside. The Commission filed a Petition for Rehearing in the prior review proceedings but did not in such petition assert that this Court was in error or seek any modification of this Court’s decision in this respect. This Court’s prior disposition of this matter is final and conclusive and is no longer subject to reargument by way of “amplification” or otherwise.

The further lapse of time since the original denial of

the motion to reopen and the continued loss being sustained in the seasonal service⁵ furnishes additional support to this Court's statement in its decision that the 1962 test period "has less and less to recommend it as a reliable basis upon which to predicate a prospective rate order." This further demonstrates that the Commission's action in denying the renewed motion to reopen is arbitrary and capricious and an abuse of discretion.

The Commission, however, uses its August 19, 1965 Order to reargue the matter, stating in effect (1) that a reopening would necessitate remanding the matter to an examiner with attendant delay, and (2) that this would not be consistent with the necessity of closing a regulatory proceeding in timely fashion. The Commission relies on numerous authorities in support of its reargument, all of which were cited to this Court by the Commission in the prior review proceedings.⁶ The Commission in the prior review proceedings both orally and in writing argued on the basis of these authorities and others that denial of reopening was justified because it would necessitate remanding the matter to an examiner with attendant delay and that this would not be consistent with the necessity of closing a regulatory proceeding in timely fashion.⁷ This Court in its decision

⁵Ex. B (Affidavit of J. F. Zumdieck) to Application for Temporary Stay and Suspension.

⁶Brief of Respondents, pp. 18, 19, 20, and Respondents' Memorandum in Opposition to the Application to Adduce Additional Evidence, pp. 4, 5 and 6.

⁷May 12, 1964 Order, pp. 2, 3 and Respondents' Memorandum in Opposition to the Application to Adduce Additional Evidence, pp. 7, 8.

specifically referred to the Commission's position in reference to the recomputation of a rate of return based on later operating results stating:

"The Commission points out, however, that no matter how simple such a computation might have been, it could not have been accomplished without remanding the proceeding to the examiner, with all of the attendant delays this would involve. The Commission argues that in the interest of bringing an end to the investigation and getting an agency rate order into effect, the Commission was warranted in denying the motion to reopen."

If the Commission considered that this Court was in error in not approving its denial of the motion to reopen it could have and apparently did consider filing a petition for a writ of certiorari. For that purpose the Commission secured from this Court an order staying issuance of judgment which was subsequently dissolved on the Commission's motion. In conformity with this Court's opinion, the Commission should have granted the renewed motion to reopen unless there were present considerations not drawn to this Court's attention which warranted denial.

What then are the asserted considerations which the Commission states were "not drawn to the Court's attention" and which "warrant the denial" of the renewed motion to reopen? The Commission states:

"In our opinion, the most important consideration in our determination of Alaska Steam's petition is the conduct of the carrier itself coupled with the remedies available to it." (p. 4)

The conduct of the carrier referred to is stated to be that although claiming that the results of its operations subsequent to November, 1962 have been disastrous, Alaska Steam "has filed no new increases since December of 1961" although it "has been free at any time to file new rates based on changed operating results, despite the pending proceedings" (p. 5). The Commission states that the proper procedure for Alaska Steam "is to file new rate increases with the Commission if in its opinion such increases are warranted" which "subsequent rate filing would thus create a 'locked-in' period for the Commission's determination" in a "new rate proceeding in which Alaska Steam will be free to introduce any evidence of past operating results and future projections." The Commission has overlooked the fact that in its May 12, 1964 Order it stated:

"Respondents may not submit tariffs which increase the rates because they claim that the year-end 1962 figures and the 1963 figures prove a different result. The amended tariffs must clearly set forth decreases, not increases." (pp. 3, 4)

The August 19, 1965 Order similarly requires the filing of tariffs setting forth decreases, not increases.

The Commission also overlooked or ignored the fact that Alaska Steam was likewise free to review the Commission orders, including the denial of the motion to reopen. Clearly Alaska Steam should not suffer a denial of its renewed motion to reopen for having been successful on the review of the prior Commission or-

ders. As a result of the prior review proceedings the Commission was required to review its findings and as noted above has now found in the August 19, 1965 Order that based on the operating data used for the test period the net profit of the seasonal service produced a rate of return of 13.97%, not 19.75% as erroneously determined in the March 5, 1964 Order. Alaska Steam proposes to show that this later finding of rate of return is likewise erroneous.

The considerations relied upon by the Commission were in fact drawn to this Court's attention by the Commission in the prior review proceedings. It might be added that inasmuch as the considerations referred to by the Commission have their basis in law and not in fact, they must be assumed to have been as well known to this Court as to the Commission. In any event, they were specifically called to this Court's attention by the Commission in substantially the same manner as expressed in the August 19, 1965 Order. Aside from being urged at the oral argument, these considerations were presented by the Commission in writing on two separate occasions, the first in Respondent's Memorandum in Opposition to the Application for Interlocutory Injunction wherein the Commission stated:

“ * * * the Court must consider the consequences to the public interest and particularly to the conduct of administrative proceedings should the injunction be granted. For, if petitioners are successful in obtaining an injunction against the ef-

fectiveness of the Commission's orders, the administrative process will have been finally and completely frustrated. Petitioners should, if they find that new increases are warranted by new data, file such increases with the Commission, rather than bring the new data before this Court in a petition to review a proceeding already concluded. There is nothing to prevent petitioners from filing such increases on the statutory thirty days notice, although such a course of action is unlikely unless their plea for an injunction is refused⁴." (p. 11) ["⁴Because the Commission can after complaint or *sua sponte* suspend the increases for four months."]

The second occasion was in Respondents' Memorandum in Opposition to the Application to Adduce Additional Evidence where the Commission stated:

" * * * if petitioners' actual experience *subsequent* to the closing of the record suggests to them that they would not be able to make a proper return under the authorized rates, their proper remedy is to file new tariffs pursuant to 46 USC 844, and establish, on the basis of a new record, the lawfulness of their rates." (p. 9)

If the Commission was of the view that this Court had not sufficiently considered these matters in arriving at its decision it could have, but did not, specify this in its Petition for Rehearing. Petitioners conclude, as does the Commission's Hearing Counsel, that all of the matters reargued by the Commission were called to this Court's attention in the prior review proceedings and that in rendering its decision and entering its decree this Court was fully aware of and considered all of such matters. The Commission has failed to point out any considerations which were not drawn to this

Court's attention which would warrant a denial of the renewed motion to reopen.

The entry of the August 19, 1965 Order denying the renewed motion to reopen without granting the hearing requested by Alaska Steam was violative of Alaska Steam's constitutional right to due process of law under the Fifth Amendment to the Constitution of the United States and in violation of the procedural requirements of the Administrative Procedure Act, § 5 (a) (b).⁸

In *Green Spring Dairy v. Commissioner of Internal Rev.*, 208 F.2d 471, 475 (4 Cir., 1953), the Court citing decisions of the Supreme Court, announces the established rule as follows:

“ * * * opportunity to present a case and to be heard is fundamental to the validity of proceedings by administrative tribunals * * *. In many decisions it has been held that the right to due notice * * * and an opportunity to be heard * * * are assured to every litigant by the Federal Constitution.”

The Commission having failed to point out any considerations not drawn to this Court's attention which would warrant a denial of the renewed motion to reopen, this cause should be remanded to the Commission with instructions to grant the motion.

⁸Title 5, U.S.C.A. § 1004(a) (b). “In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *. (a) Persons entitled to notice of * * * hearing shall be timely informed * * *. (b) The agency shall afford all interested parties opportunity for * * * hearing * * *.”

II.**The Rate of Return in the Seasonal Service****A. Error in Allocation of Administrative and General Expense.****(Specification of Errors 4)**

Alaska Steam allocated administrative and general expense on the basis of actual vessel days (Ex. 3-B-5, sheet 2). This Court, in the prior review proceedings, approved the formula adopted by the Commission for allocating general and administrative expense, namely, "in the proportion that the total vessel operating expense of each service bears to the total vessel operating expense." On the method adopted by Alaska Steam the amount of \$35,712 was allocated to the charter operation of the vessel TALKEETNA, referred to as the "Off-shore" or "Other" operation. In applying the formula approved by this Court the Commission in the August 19, 1965 Order did not correct this allocation made to the charter operation, but merely allocated the balance of the administrative and general expense in the amount of \$1,625,330 (\$1,661,042 less \$35,712) between the scheduled and seasonal services on the formula approved by this Court. The proper method of allocation is as shown on Schedule 1.⁹ This results in an increase of \$5,054 in the administrative and general expense to be allocated to the seasonal service under the method approved by this Court. Correcting only for this error in the allocation of administrative and general ex-

⁹This Schedule and other Schedules referred to in this brief appear in the appendix.

pense, the rate of return in the seasonal service at the Company rates based on the test period is reduced from 13.97% as now found by the Commission to 13.24% (Schedule 2, Col. A).

B. Error in Deduction of Interest in Determining Federal Income Tax.

(Specification of Errors 5)

In the Commission's recalculation of the Federal income tax applicable to the seasonal service an item of interest of \$13,015 has been deducted from the gross profit used in determining the Federal income tax, a portion of which is allocated to the seasonal service. This is interest paid by Alaska Steam during the test period on vessel mortgages, which was disallowed as an expense by the Commission in its determination of the gross profit for rate making purposes. This item was not deducted by the Commission in its prior calculation of Federal income tax and should not now be deducted. The Commission does not disclose the basis on which this deduction is made or the reasons therefor.

Presumably the Commission will assert that although such interest is not to be allowed in determining the rate of return earned by Alaska Steam, it is nevertheless to be deducted in the calculation of Federal income tax. The error in any such contention is that the Commission is not attempting to determine the actual Federal income tax of Alaska Steam, but is only concerned with the determination of such expenses, including taxes, deemed allowable in rate proceedings to deter-

mine profit and the ultimate question of rate of return. Inasmuch as such interest is not allowable as an expense in determining Alaska Steam's profit for rate making purposes, it is improper to include it as a deduction in determining its theoretical Federal income tax, otherwise a pure happenstance having no bearing on the validity of rates is permitted to affect rates.

It is immaterial so far as the determination of profit in a rate proceeding is concerned whether Alaska Steam has mortgages on its vessels or not. If it does have such mortgages it is likewise immaterial whether it does or does not pay interest thereon and in what amount. If Alaska Steam paid the principal of the mortgages, thus relieving itself of interest expense, the propriety of rates charged by it for its services would be in no way affected. Likewise, if it does not pay the mortgages or increases the amount thereof and continues to pay interest or increased interest thereon, this also has no bearing on the propriety of its rates. If the rates of two companies in the same trade were being tested it would certainly be improper to permit the difference in their interest obligations on mortgages on vessels to affect the propriety of their respective rates.

Interest is a cost of acquiring capital but such cost is neither included in the rate base nor in expense in a rate proceeding. Inasmuch as it is apparent that the Commission has not and cannot justify the treatment given to this item of interest in calculating the Federal

income tax, such tax should be calculated on the gross profit without reference to such interest. Correcting for this error¹⁰ the rate of return in the seasonal service at the Company rates based on the test period is reduced from 13.97% as found by the Commission to 12.85% (Schedule 2, Col. B).

C. Error in Treatment of Charter Operation of Vessel *Talkeetna*.

(Specification of Errors 6)

During the test period the vessel TALKEETNA, employed exclusively in the seasonal service, was assigned to an off-shore charter voyage of 77 days while not required in the seasonal service. The purpose of this charter operation was to eliminate the layup expense which would otherwise have been chargeable to the seasonal service and to give the seasonal service the benefit of any operating profit (Tr. 205, 442, 989, 990).¹¹ The charter operation resulted in an operating profit of \$21,270 (Ex. 3-B-5, sheet 2). There was no increase in the depreciation chargeable to this vessel by reason of the charter operation and no increase in total administrative and general expense. The Commission allocated depreciation of \$8,706 to the vessel while engaged in the charter operation and \$35,712 of the total

¹⁰ In addition to correcting for the error in the allocation of administrative and general expense.

¹¹ Tr. refers to the pages of the record of testimony in the proceedings before the Commission.

administrative and general expense.¹²

Alaska Steam asserts that the charter operation should not be considered as a separate service but should be considered as a part of the seasonal service to determine the profit of the seasonal service. The Commission did not include the charter operation as a part of the seasonal service but did include it as an alleged loss operation in determining the Federal income tax applicable to the seasonal service.

If there had been no charter operation the seasonal service would have been charged with the layup expense of the vessel during the charter period as well as with the depreciation of the vessel charged to the charter operation and with the portion of the administrative and general expense to be properly allocated to the charter operation and it would not have had the benefit of the \$21,270 operating profit. The Commission in its treatment of the charter operation ignores these facts. If the charter operation is included as a part of the seasonal service that service is to be credited with the operating profit and charged with the properly assigned depreciation and administrative and general expense resulting in a deduction of \$1,787 in the gross profit of the seasonal service.¹³

If the charter operation were included as a part of the seasonal service the rate of return in that service

¹² The allocated portion of the administrative and general expense should have been \$14,351 (Schedule 1, *supra* p. 14).

¹³ Schedule 1.

at the Company rates would have been 12.74% based on the test period.¹⁴ If none of the other adjustments taken into consideration in Schedule 3 were made the rate of return would have been 12.23% (Schedule 4). The Commission does not disclose the basis for its treatment of the charter operation of the vessel TALKEETNA nor the reasons therefor and such treatment is not justified by the facts.

The combined operating revenue and vessel operating expense in the seasonal service, based on the test period, was \$7,954,792 (Ex. 3-B-5, sheet 1). Giving effect to the adjustments made in Schedule 3, the excess net profit was but \$42,676 (\$197,958 less \$155,282) or slightly in excess of one-half of 1% of such combined revenue and expense. Giving effect to the adjustments made in Schedule 4 the excess net profit was but \$34,630 (\$189,912 less \$155,282) or less than one-half of 1% of such combined revenue and expense. It can thus be readily seen that a slight decrease in revenue or increase in expense, or both, could result in a loss operation such as in fact resulted in 1963 and 1964 as disclosed by Alaska Steam to the Commission in its unsuccessful efforts to secure a reopening of the Commission's investigation.

¹⁴ Schedule 3. This schedule likewise adjusts for the errors in the allocation of administrative and general expense and in the deduction of interest in the process of determining Federal income tax.

III.

The August 19, 1965 Order Results in Confiscation, Deprivation and Taking of Property of Alaska Steam for Public Use Without Due Process of Law and Without Just Compensation, Contrary to and in Violation of the Fifth Amendment to the Constitution of the United States.

(Specification of Errors 3)

The Fifth Amendment to the Constitution of the United States provides:

“No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Alaska Steam's Application for Leave to Adduce Additional Evidence filed in these review proceedings, is for the purpose of vindicating the claim of Alaska Steam that the Commission's August 19, 1965 Order deprives it of its property for public use without due process of law and without just compensation, contrary to its rights under the Fifth Amendment to the Constitution of the United States.

The Judicial Review Act, § 7(c) (Title 5 U.S.C.A., Chap. 19A, § 1037(c)) provides that the reviewing court may order additional evidence to be taken by the administrative agency if it is shown to the satisfaction of the Court “that such additional evidence is material, and * * * that there were reasonable grounds for failure to adduce such evidence before the agency.”

The Commission, by its August 19, 1965 Order, re-

quired Alaska Steam to put decreased rates in effect in the seasonal service, which rates Alaska Steam asserts are confiscatory not only as to the present but also as to the past and future. The Commission, in its May 12, 1964 Order, documented its refusal to receive evidence on the issue of confiscation, as follows:

“The Examiner refused * * * to hold the record open until final figures of 1962 could be submitted * * *. * * * we rejected * * * request to submit additional data last November, and again reject it now.”

By its August 15, 1965 Order the Commission followed its prior procedure and denied the renewed motion to reopen for the purpose of receiving in evidence additional operating figures. It clearly appears from the record before this Court that the data which petitioners unsuccessfully sought to produce before the Commission showed that the seasonal service would have produced noncompensatory results in 1962 at the decreased rates ordered by the Commission and that in 1963 and 1964 the seasonal service operated at a loss even at the Company rates in effect, which loss would have been increased had the decreased rates ordered by the Commission been in effect.¹⁵

In *Baltimore & O. R. Co v. United States*, 298 U.S. 349 (1936), the Supreme Court stated the basic consti-

¹⁵ Findings of this Court in its Order on Application for Interlocutory Injunction in the prior review proceedings, No. 19297, filed June 2, 1964 and affidavit of J. F. Zumdieck attached as Exhibit B to the Application for Temporary Stay and Suspension.

tutional principle, as announced in earlier cases cited therein, that neither Congress nor a federal regulatory agency has the power to require carriers "to serve the public at rates that are confiscatory." The Court had before it divisions established by the Interstate Commerce Commission which were asserted to be confiscatory. The Court stated that in view of the duties of carriers to the public, when confiscatory rates or divisions are prescribed by a regulatory agency pursuant to statutory authority, this is equivalent to Congressional action "requiring the carriers to serve for the amounts specified" thus expropriating "the use of carriers' property." The Court further stated that when such rates or divisions "are, or later shall become, less than just compensation, the carriers may not be required to serve therefor" (p. 357).

The next question dealt with by the Court was how do affected carriers obtain relief from an order establishing confiscatory rates or divisions. The Court, referring to divisions, stated that "the carriers may by suit in equity have the order prescribing, or requiring to be kept in force, the challenged divisions adjudged void and its enforcement permanently enjoined" (pp. 357, 358). It is to be noted that the jurisdiction to review the August 19, 1965 Order of the Commission is by the Judicial Review Act, § 2 (Title 5 U.S.C.A., Chap. 19A, § 1032) vested exclusively in an appropriate court of appeals.

In connection with such a suit in equity in a district court the Court further stated:

“There is no statute that can be held to limit * * * trial of an issue of confiscation. * * *

“There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission’s findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.

“ * * * The just compensation clause may not be evaded or impaired by any form of legislation. * * * The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.” (pp. 363, 364, 368 and 369)

In *New York v. United States*, 331 U.S. 284 (1947), it was contended that rates established by the Interstate Commerce Commission were confiscatory and on review in a district court additional evidence on this issue was received. The Supreme Court stated that

“ * * * if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a fur-

ther preliminary appraisal of the facts which bear on the question.” (p. 336)

The Court pointed out that in *Baltimore & Ohio*, as in the case at bar, the Commission refused to receive evidence proffered on the point of confiscation, whereas in the case then before the Court the Commission received all evidence that was offered. Under such circumstances the Court stated:

“ * * * correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial de novo.” (p. 335)

In *American Trucking Assos. v. United States*, 344 U.S. 298 (1953), the Supreme Court again recognizes the constitutional principle stated in *Baltimore & Ohio* relating to agency established rates for carriers and states:

“ * * * that those concerned with an order affecting their just compensation for transportation services must be heard; indeed, their right to introduce evidence to support the claim that the order in question will unconstitutionally confiscate their property may be enforced even in the District Court if the Commission bars an opportunity to do so.” (p. 320)

The Court further states that an order of a regulatory agency establishing rates to be charged by carriers is “said to confiscate property when it prohibits a reasonable return on investment beyond operating and initial costs” (pp. 321, 322).

The Court further states that where the “constitutional right of compensation” is drawn in question:

“ * * * we have admonished the Commission and the courts to permit introduction of evidence on the economic impact of a rate order where the claim that it could not have been proffered during the original proceedings was genuine.” (p. 322)

From the foregoing authorities it becomes manifest that the provisions of the Judicial Review Act, § 7, for the adducing of additional evidence before the agency whose order is under review, permits this Court, under circumstances such as are presented here, to refer to such agency, at least initially, the taking of evidence on the issue of confiscation. The Application for Leave to Adduce Additional Evidence should be granted, reserving to this Court the final determination of the issue of confiscation.

CONCLUSION

The prayer of the Petition for Review should be granted.

Respectfully submitted,

EDWARD G. DOBRIN

STANLEY B. LONG

ARTHUR G. GRUNKE

Attorneys for Petitioners

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG

Of Counsel

Office and Post Office Address:

14th Floor Norton Building

Seattle, Washington 98104

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD G. DOBRIN
Attorney

APPENDIX

APPENDIX

EXHIBIT TABLE

| <i>Exhibit No.</i> | <i>Identified (Tr.)</i> | <i>Offered (Tr.)</i> | <i>Received (Tr.)</i> |
|------------------------|-----------------------------|--------------------------|---------------------------|
| 1 | 21 | 36 | 37 |
| 2-A-30 | 45 | 1157 | 1162, 1163 |
| 3-B-1 | 55 | 350 | 351 |
| 3-B-5 | 55 | 358 | 1158, 1162, 1163 |
| 3-B-9 | 55 | 1158 | 1158, 1162, 1163 |
| 3-B-22 | 55 | 1158 | 1158, 1163 |
| 3-B-35 | 55 | 350 | 351 |
| 4 | 86 | 350 | 350, 351 |
| 5 | 151 | 350 | 350, 351 |
| 6 | 352, 353 | 397 | 397 |
| 7 | 357 | 1297 | 1297 |
| 8 | 357 | 397 | 397 |
| 9 | 357 | 397 | 397 |
| 10 | 398 | 424 | 424 |
| 12 | 411 | 424 | 424 |
| 22 | 860 | 1297 | 1297 |
| 24 | 991 | 1157 | 1158, 1162 |

39 (Late Filed Exhibit. R. 29)

SCHEDULE 1

Allocation of Administrative and General Expense *Operating Expense (Ex. 3-B-5, sheet 1)*

| | <u>Seasonal</u> | <u>Scheduled</u> | <u>Other</u> | <u>Total</u> |
|----------------------|-----------------|------------------|--------------|--------------|
| | \$3,425,067 | \$11,063,411 | \$126,334 | \$14,614,8 |
| Per Cent of Total | 23.436% | 75.700% | .864% | 100% |

Administrative and General Expense (Ex. 3-B-5, sheet 2)

| | <u>Seasonal</u> | <u>Scheduled</u> | <u>Other</u> | <u>Total</u> |
|--|-----------------|------------------|--------------|--------------|
| | 23.436% | 75.700% | .864% | 100% |

| | | | | |
|---------------------|------------|--------------|-----------|------------|
| Allocated Amount | \$ 389,282 | \$ 1,257,409 | \$ 14,351 | \$ 1,661,0 |
|---------------------|------------|--------------|-----------|------------|

| | | | | |
|--------------------------------------|---------|-----------|--------|--|
| Amount Allocated by Commission | 384,228 | 1,241,102 | 35,712 | |
|--------------------------------------|---------|-----------|--------|--|

| | | | | |
|-------------------------------------------|---------|----------|--------|--|
| Adjustment Required in Gross Profit | (5,054) | (16,307) | 21,361 | |
|-------------------------------------------|---------|----------|--------|--|

| | | | | |
|----------------------------------------|---------|--------|----------|-------|
| Gross Profit Found by Commission | 360,508 | 73,372 | (23,148) | 410,7 |
|----------------------------------------|---------|--------|----------|-------|

| | | | | |
|-----------------------------|---------|--------|---------|-------|
| Adjusted Gross Profit | 355,454 | 57,065 | (1,787) | 410,7 |
|-----------------------------|---------|--------|---------|-------|

EXHIBIT TABLE

SCHEDULE 2

| | <i>Col. A</i> | <i>Col. B</i> |
|---------------------------|------------------|------------------|
| Gross Profit | \$355,454 | \$355,454 |
| Federal Income Tax | 173,463* | 179,295** |
| | <u>\$182,391</u> | <u>\$176,159</u> |
| Profits related companies | 23,461 | 23,461 |
| Net profit | <u>\$205,852</u> | <u>\$199,620</u> |
| Rate of Return | 13.24% | 12.85% |
| Income tax calculation | | |

| | <i>Seasonal</i> | <i>Scheduled</i> | <i>Other</i> | <i>Total</i> |
|----------------|-------------------|--------------------|--------------|--------------|
| Gross Profit | \$ 355,454 | \$ 57,065 | \$ (1,787) | \$ 410,732 |
| Rate Cent | 86.166% | | | |
| Total | 410,732 | | **Total | 410,732 |
| Interest | 13,015 | 52% (less \$5,500) | | 208,081 |
| | <u>\$ 397,717</u> | | | |
| % (less \$500) | \$ 201,313 | | | |

SCHEDULE 3

| | |
|---------------------------|------------------|
| Gross Profit | \$355,454 |
| Adjustment | 1,787 |
| | <u>\$353,667</u> |
| Federal Income Tax | 179,170* |
| | <u>\$174,497</u> |
| Profits related companies | 23,461 |
| Net Profit | <u>\$197,958</u> |
| Rate of Return | 12.74% |
| Income tax calculation | |

| | <i>Seasonal</i> | <i>Scheduled</i> | <i>Total</i> |
|------------------|-----------------|------------------|--------------|
| Gross Profit | \$ 353,667 | \$ 57,065 | \$ 410,732 |
| Rate Cent | 86.106% | | |
| Total | \$ 410,732 | | |
| % (less \$5,500) | \$ 208,081 | | |

EXHIBIT TABLE

SCHEDULE 4

| | |
|---------------------------|------------------|
| Gross Profit | \$360,508 |
| Adjustment | 23,148 |
| | <u>\$337,360</u> |
| Federal Income Tax | 170,909* |
| | <u>\$166,451</u> |
| Profits Related Companies | 23,461 |
| Net Profit | <u>\$189,912</u> |
| Rate of Return | 12.23% |

*Income tax calculation

| | <u>Seasonal</u> | <u>Scheduled</u> | <u>Total</u> |
|-------------------|-----------------|------------------|--------------|
| Gross Profit | \$ 337,360 | \$ 73,372 | \$ 410,7 |
| Per Cent | 82.136% | | |
| Total | \$ 410,732 | | |
| 52% less \$5,500) | \$ 208,081 | | |